COURT NO.2

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Income Tax Appeal No.86 of 2003

1. The Commissioner of Income Tax, Dehradun.
2. Income Tax Officer, Ward-I, Dehradun ... Appellants

Versus

Mr. Ajay Kumar Shah Jagati,
10 Convent Road, Dehradun

... Respondent

Dated: December 09,2005

Mr.S.K. Posti, Advocate for the appellants.
Mr.D.S. Patni, Advocate for the respondent.

Coram: Hon. P.C. Verma, J.
Hon. J.C.S. Rawat, J.

This appeal has been preferred against the judgment and order-dated 08.11.2002, passed by the Income Tax Appellate Tribunal, Lucknow Bench, Lucknow in ITA No.5107(Del) of 1995. The dispute in the present appeal relates to the Assessment Year 1989-90. The substantial question of law raised in the appeal is as follows:

> ***"Whether on the facts and circumstances of the case of the ITAT was legally justified in upholding the order of Ld. CIT(A) wherein penalty u/s 271(1)(c) of I.T. Act, 1961 amount to Rs.2,37,100/- has been deleted?"***

2. Brief facts of the case giving rise to the present appeal are that the assessee filed his return showing income of Rs.37,660 on 31.10.1989 in the status of HUF. Verification was signed by Sri A.K.Sah Jagati in the capacity of Karta of the family for payment of Income Tax amounting to Rs.5,865/-. The documents were also filed alongwith the return which have been

referred by the Assessing Officer while passing the Order u/s 271(1)(c) of I.T. Act, 1961. In the assessment year 1989-90, the assessment was completed on income of Rs.4,82,660/- vide order dated 10.02.1992 initiating penalty under section 271(1)(c) of I.T. Act, 1961. The assessee was served a notice on 31.03.1992 fixing the date for compliance on 04.03.1993. On 04.03.1993, the assessee requested to keep proceedings in abeyance till the decision of the second appeal filed before the I.T.A.T. Besides this, no other explanation was sought by the assessee for the concealed income for which penalty was to be imposed. The Assessing Authority held that the assessee enjoys income from house property as well as interest as per details on record. It was noticed during the year under consideration that the assessee entered into an agreement with M/s Kumaon Constructions, Nainital for a total consideration of Rs. 13,20,900/-. The appellant-HUF agreed to sell approximately 7,000 sq. ft. of land to M/s Kumaon Constructions for a total consideration of Rs.25.00 lacs. It was also stipulated in the agreement to sale that the assessee would execute Sale Deed in favour of M/S Kumaon constructions, Nainital or to its nominees in whole or in part. During the period relevant to the year consideration 24 plots of land had been transferred to 24 nominees of M/s Kumaon Constructions, Nainital for a total consideration of Rs.13,20,900/-. During the course of assessment proceedings, assessee was required to explain why the provisions of Section 2(47)(v) of I.T. Act, 1961 be not involved. The assessee filed his explanation on 08.02.1992. While considering the said explanation of the assessee, the Assessing Officer found that the provisions of Section (2)(47)(v) of I.T. Act, 1961 were not attracted in the facts and circumstances of the case. It was also stated tat the possession of the whole land as agreed upon to be sold under registered agreement has

not been given. The assessee's contention was negatived on the basis of facts that 3700 sq. mt. land out of 7000 sq. mt. land agreed to be sold has been transferred during the year under consideration. As per Section 2(47)(v) any transaction involving the liability of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to u/s 53-A of the Transfer of Property Act 1982 will be treated as transfer. Considering the above facts, it was held by the Assessing officer that the agreement to sell 7000 sq. mt. land will be treated as transfer. Accordingly, capital gain worked out at Rs.24,00,000 (24 lacs – 1 lac). The assessee invested Rs.15.00 lacs in IDBI Bonds, therefore the capital gain worked out was Rs.9.00 lacs. After allowing the deduction under section 48, net chargeable income under capital gains worked out at Rs.4,45,000/-. The Assessing Officer found that in the assessment year under consideration, the assessee had not filled the space left for capital gains. Thereafter, the deficiency letter under section 139(9) dated 28.02.1990 was issued.

3. These facts clearly reveal that the assessee knowingly, willingly and deliberately concealed the income for furnishing the inaccurate particulars of his income. Accordingly, the Assessing Authority imposed a penalty of Rs.2,37,100/- after obtaining the approval from CIT, Bareilly. Aggrieved by the order of imposition of penalty, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals). The CIT (Appeals) after the scrutiny of records came to the conclusion that it was established that the agreement to sale so executed on 25.04.1988 has been cancelled on 22.10.1990. The deed canceling the earlier agreement clearly provides all the facts. The CIT (Appeals) after perusing the evidence on record held that since the said agreement to sale was cancelled and no further sale as per the earlier deed of agreement to sell had been

affected, hence there remains no case for imposition of concealment of penalty. Accordingly, the penalty imposed was cancelled by the CIT (Appeals). Against this order, the Revenue went in appeal before the ITAT, Lucknow. The ITAT also found from the records that the agreement to sale dated 25.04.1988 was cancelled by agreement dated 22.10.1990 and there was also no basis for making addition to the capital gain, therefore there was no concealment and such there remains no basis for imposing penalty u/s 27(1)(c) of the Income Tax Act, 1961.

4. Both the Appellate Courts have accurately come to the conclusion that there was no concealment of fact in view of the cancellation of an earlier agreement by a subsequent agreement. Therefore, recalling of penalty was justified. We do not find any infirmity or illegality in the order passed by the appellate courts. Hence, in the facts and circumstances of the case, the question framed in the Memo of Appeal is answered in favour of the assessee.

5. Accordingly, the appeal is dismissed. No order as to costs.

(J.C.S. Rawat, J.) **(P.C. Verma, J.)**

Rajeev Dang